91

Supreme Court, U.S.
FILED

071329 APR 18 2008

OFFICE OF THE CLERK

No. (1)

In The

Supreme Court of the United States

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division
Petitioner,

v.

RONALD CURTIS CHAMBERS,
Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

GREG ABBOTT
Attorney General of Texas

EDWARD L. MARSHALL
Chief, Postconviction
Litigation Division

KENT C. SULLIVAN
First Assistant
Attorney General

*ELLEN STEWART-KLEIN
CARRIE ELIZABETH PARSONS
Assistant Attorneys General
Postconviction Litigation Division

ERIC J. R. NICHOLS
Deputy Attorney Attorney
For Criminal Justice
* Counsel of Record

P.O. Box 12548,
Capitol Station
Austin, Texas 78711
(512) 936-1400

ATTORNEYS FOR PETITIONER

This is a capital case.

QUESTION PRESENTED

In *Abdul-Kabir v. Quarterman*, the majority of this Court promised that new sentencing trials would not be required in every case, reassuring the dissenters that "in several instances, we concluded, after applying the relevant law, that the special issues provided for adequate consideration of mitigating evidence." 127 S. Ct. 1654, 1672 & n.20 (2007). But that promise is fundamentally inconsistent with the relief granted in this case. Indeed, the lower court's grant of relief is based on scant and unpersuasive evidence. Further, the lower court has now elevated poverty, a class and economic disadvantage, with the personal liabilities previously categorized as *Penry* evidence. Thus, the lower court's decision gives rise to two important questions:

1. The court of appeals interpreted this Court's remand as instructions to reverse, believing that the majority of the Court found some of Chambers's evidence to be beyond the scope of Texas's former sentencing special issues. Did the court of appeals err in holding Chambers's "scant" evidence of economic disadvantage had relevance to the special issues in a way the jury was unconstitutionally precluded from considering?

2. The court below held in *Nelson v. Quarterman*,[1] that *Penry* error is structural and not subject to a harmless-error analysis. Bound by that decision, the lower court refused to consider the persuasiveness, relevance or even amount of Chambers's evidence. Did the court of appeals erroneously refuse to consider whether Chambers –who has been thrice convicted and sentenced to death for this same crime– was actually harmed by any error that occurred at sentencing?

---

[1] 472 F.3d 287, 314-15 (5th Cir. 2006) (en banc), *cert. denied*, 127 S. Ct. 2974 (2007).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES vi

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

I. Facts of the Crime 2

II. The Punishment Trial 8

A. Chamber's mitigation evidence 8

B. The jury charge 10

III. Direct Appeal and Postconviction Proceedings 12

REASONS FOR GRANTING THE WRIT 14

I. The Lower Court Erred in Finding *Penry* Error Because this Court's Rulings in *Abdul-Kabir* and *Brewer* Did Not Fundamentally Alter its Prior Jurisprudence. And There Was No Argument from the Prosecutor That Confined the Jury's Consideration of the Evidence 16

TABLE OF CONTENTS, continued

Page

II. The Precedent of this Court Makes Clear That *Penry* Error Is Not Structural Error, Thus the Inquiry Does Not End upon the Determination That There Was a Reasonable Likelihood That the Jury Was Precluded from Considering and Giving Effect to the Defendant's Mitigating Evidence 20

A. With only the exception of defective reasonable doubt instructions, this Court has unequivocally held jury-charge error to be trial error 20

B. That *Penry* error arises in the context of death penalty case does not transform such garden-variety trial error into structural error 23

C. The conclusion that the jury instructions created a reasonable likelihood of misapplication does not end the inquiry 27

III. In spite of the *Penry* Error in this Case, the Record Does Not Support a Finding that the Error had a "Substantial and Injurious Effect or Influence" on the Verdict 28

CONCLUSION 32

APPENDIX I

Chambers v. Quarterman, slip op. No. 03-11248, 2007 U.S. App. LEXIS 29832, 2007 WL 4553657 (5th Cir. Dec. 27, 2007)

APPENDIX II

Chambers v. Quarterman, 127 S. Ct. 2126 (2007)

APPENDIX III

Chambers v. Quarterman, No. 03-11248 (5th Cir. Jan. 28, 2008) (unpublished order denying rehearing en banc)

TABLE OF AUTHORITIES

Cases	Page
Abdul-Kabir v. Quarterman, 127 S.Ct. 1654 (2007)	passim
Arizona v. Fulminante, 499 U.S. 279 (1991)	20
Batson v. Kentucky, 476 U.S. 79 (1986)	12
Boyde v. California, 494 U.S. at 380	26
Brecht v. Abrahamson, 507 U.S. 619 (1993)	25, 26, 27
Brewer v. Quarterman, 127 S. Ct. 1706 (2007)	passim
Calderon v. Coleman, 525 U.S. 141 (1998)	22, 26
Carella v. California, 491 U.S. 263 (1989)	22
Clemmons v. Mississippi, 494 U.S. 738 (1990)	22
Duckworth v. Egan, 492 U.S. 195 (1989)	29
Eddings v. Oklahoma, 455 U.S. 104 (1982)	23, 25
Estelle v. Smith, 451 U.S. 454 (1981)	12, 26
Franklin v. Lynaugh, 487 U.S. 164 (1988)	30
Fry v. Pliler, 127 S. Ct. 2321 (2007)	27, 29

TABLE OF AUTHORITIES, continued

Cases **Page**

Gideon v. Wainwright, 372 U.S. 335 (1963) 21

Graham v. Collins, 506 U.S. 461 (1993) 17, 19

Johnson v. Texas, 509 U.S. 350 (1993) ..... passim

Kotteakos v. United States, 328 U.S. 750 (1946) 27

Lockett v. Ohio, 438 U.S. 586 (1978) 23, 25, 30

McGautha v. California, 402 U.S. 183 (1971) 30

McKaskle v. Wiggins, 465 U.S. 168 (1984) 21

McKlesky v. Zant, 499 U.S. 467, 490 (1991) 29

Mitchell v. Esparaza, 540 U.S. 12 (2003) 22

Neder v. United States, 527 U.S. 1 (1999) 20, 22

Nelson v. Quarterman, 472 F.3d 287, (5th Cir. 2006) (en banc), *cert. denied*, 127 S. Ct. 2974 (2007) ..... passim

Penry v. Lynaugh, 492 U.S. 302 (1989) ("*Penry I*") ..... passim

Penry v. Johnson, 532 U.S. 782 (2001) ("*Penry II*") ..... passim

Pope v. Illinois, 481 U.S. 497 (1987) 22

TABLE OF AUTHORITIES, continued

Cases **Page**

Rose v. Clark, 478 U.S. 570 (1986) ..... passim

Sawyer v. Smith, 497 U.S. at 490 28

Singletary v. Smith, 507 U.S. 1048 (1993) 25

Skipper v. South Carolina, 476 U.S. 1 (1986) 25

Smith v. Quarterman, 515 F.3d 392, 414 (5th Cir. 2008) 15

Smith v. Texas, 127 S. Ct. 1686 (2007) 23

Sullivan v. Louisiana, 508 U.S. 275 (1993) 21, 22, 27

Tennard v. Dretke, 542 U.S. 274 (2004) 24

Tumey v. Ohio, 273 U.S. 510 (1927) 21

United States v. Gonzalez-Lopez, 126 S. Ct. 2557 (2006) 20

United States v. Hastings, 461 U.S. 499 (1983) 30

Vasquez v. Hillery, 474 U.S. 254 (1986) 21, 27

Waller v. Georgia, 467 U.S. 39 (1984) 21

TABLE OF AUTHORITIES, continued

Cases **Page**

Washington v. Recuencco, 126 S. Ct. 2546 (2006) 22

Yates v. Evatts, 500 U.S. 391 (1991) 29

Constitutions, Statutes and Rules

28 U.S.C. § 1254(1) 1

Sup. Ct. R. 13.3 (West 2008) 1

Tex. Code Crim. Proc. art. 37.071 (West 1992) 11

OPINION BELOW

After this Court remanded for reconsideration in light of *Abdul-Kabir*, the court of appeals reversed the district court's denial of habeas corpus relief and remanded with instructions to grant the writ. PA I: 4 (*Chambers v. Quarterman*, slip op. No. 03-11248, 2007 U.S. App. LEXIS 29832, 2007 WL 4553657 (5th Cir. Dec. 27, 2007)).[2]

JURISDICTION

The Director's petition for writ of certiorari is timely filed on or before April 28, 2008. Sup. Ct. R. 13.3 (West 2008). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII.

---

[2] "PA" refers to the appendix to the instant petition for certiorari review. "Tr" refers the to transcript, the clerk's record of pleadings and documents filed in the trial court. "RR" refers to the reporter's record of transcribed trial proceedings.

STATEMENT OF THE CASE

I. Facts of the Crime

On Thursday, April 10, 1975, Mike McMahan, a Texas Tech student, was in Dallas for a convention. 39 RR 107-10. By the early morning hours of the next day, the police would find Mike murdered, his body savagely beaten and shot.

The morning of April 10th, Mike contacted Deia Roberts (née Sutton), a former classmate to ask if she wanted to get together with him and his friends at a nightclub called Wellington's. 39 RR 109-10, 112 & 114. Deia agreed and met Mike at her home around 10:30 p.m. 39 RR 111. At Wellington's, they ordered a drink, danced, and chatted with Mike's friends. 39 RR 115. Deia and Mike left at about 12:45 a.m. 39 RR 115-16.

As they approached Mike's car, Deia noticed a car parked next to it with four men sitting inside. 39 RR 111 & 116-17. As Mike was putting his keys in the ignition, two of the men got into Mike's car. 39 RR 118. Chambers was the first man to get in the car. 39 RR 119. Deia turned to face Chambers, who instructed her, "Don't move or I'll shoot you." 39 RR 120. Deia noticed that Chambers had a pistol and he told Deia to get in the back seat in a mean and angry tone. 39 RR 121-23. Chambers's cohort, Clarence Ray Williams was the driver. 39 RR 122-24. When she got in the back seat, Deia noticed a shotgun on the floor in front of Chambers. 39 RR 124-25. Chambers told Williams to get out of there, so Williams backed up and drove off. 39 RR 124-26.

Deia's purse was in her lap, and Chambers took it and emptied it out. 39 RR 126-27. Chambers instructed Mike to take off his pants and hand them over, then Chambers emptied the pockets and returned the pants. 39 RR 127-29. Next, Chambers demanded Deia's coat and watch. 39 RR 129-30. Whenever Deia looked at Chambers, he repeated, "Don't look at me." *Id.* Deia described Chambers as mean and completely in control. 39 RR 132.

Williams drove to a remote location and stopped the car near the levee. 39 RR 134-36. Chambers ordered everyone out. 39 RR 136. Deia asked for her purse back, but Chambers refused, saying there would be fingerprints on it. *Id.* Deia noticed that the car she had seen earlier was parked behind them. 39 RR 137. Chambers ordered everyone down the levee, and led the way. 39 RR 137-38. Chambers had both the shotgun and the pistol. 39 RR 138. When the couple did not move, Williams pushed them. 39 RR 139. Mike was on Deia's right, and they walked three-fourths of the way down until Chambers yelled for them to stop. *Id.*

Chambers ran behind the couple, and Deia stepped toward Mike and took his hand. 39 RR 140. Mike asked in a scared manner what the robbers wanted them to do, saying that they would cooperate. 39 RR 142. Deia heard a gunshot; Mike fell screaming and rolling down the hill. *Id.* She heard a second gunshot, and a third that hit her in the back of the neck. *Id.* The bullet that struck Deia lodged at the base of her brain and remains there to this day. 39 RR 142-43. After Deia fell screaming, there were shots to each side of her. 39 RR 143.

When the shooting stopped, Mike was ten to fifteen feet from Deia, and she was face down on the ground. 39 RR 143. She heard footsteps, the two men running to the car, and two car doors slamming. 39 RR 144 & 182. Mike called to her in a soft voice, "Deia, are you all right?" 39 RR 144. Deia was so frightened she did not answer, so Mike called again louder this time. 39 RR 145. Deia hushed him, "Don't talk, be quiet," and she heard the car door open. 39 RR 147 & 182. Then Deia heard the driver say, "Hey, man, they're not dead." 39 RR 147. Chambers replied, "They gotta be dead. I shot 'em in the head," but Williams said again, "No, man, they're not dead." 39 RR 148.

Deia heard footsteps running back to Mike. 39 RR 145. She heard Chambers say, "Get up, boy." 39 RR 145 & 148. Mike did not get up, and Chambers said again, "Get up, boy." 39 RR 148. Deia "heard this horrible thud and Mike screamed." *Id.* Deia heard footsteps coming towards her. 39 RR 149. The driver told her to "Get up," but she did not move. *Id.* Williams hit Deia in the back with his fist, and pulled her up on her knees by her shirt. *Id.* She was facing Williams and could see past him where Chambers was standing over Mike. *Id.* Chambers "was holding the shotgun and he was swinging it down at--hitting him in the head, over and over and . . . Mike was screaming and you could hear thud. It was a horrible sound." *Id.*

Chambers beat Mike's head ten to twenty times, and Williams hit Deia in the face several times. 39 RR 150. Chambers instructed Williams, "Take 'em to the water," and Williams grabbed Deia and took her to the water at the bottom of the hill. *Id.* Williams told Deia to put her face in the water, and pushed her face into it. 39

RR 151. This occurred a couple of times, during which Deia held her breath as long as she could before pushing up from the water. *Id.* & 39 RR 192. When she pushed up, she "could hear Mike screaming and hear that horrible sound." 39 RR 151. Williams pulled Deia up on her knees facing Mike and Chambers, and Williams began choking her. 39 RR 151-52. She could still see Chambers swinging the shotgun at Mike's head as Mike screamed, but "Mike quit screaming and he quit swinging that gun, and then the driver let go of me." 39 RR 152. Deia knew she "was going to be next," and Chambers came toward her. *Id.* Deia said, "God, please don't kill me," and put her hands over her head as Chambers swung down and hit her three times with the shotgun. *Id.* & 39 RR 207. Williams said, "She's dead. Let's go." 39 RR 153.

Deia lay there and could not get up. *Id.* She was not sure if she was cold or dead, she was tingly, and she felt like she should stay down because if she got up, she "knew what had just happened." *Id.* Deia was talking to herself, so she figured she must not be dead, and she tried to count to sixty but could not get past twelve and had to keep starting over. *Id.* Her whole body began to shake, her fingers were tingly, and her toes were cold. *Id.* Deia was shaking so much she was afraid someone would see her, and she knew she needed to get help. 39 RR 153-54. She crawled to Mike, called his name several times with no answer, and shook him. *Id.* She sensed he was dead. *Id.*

Deia started walking from the bottom of the levee quoting scripture and praying for sustenance to find aid. *Id.* Eventually, she was able to make it into the LeBaron Hotel cold, wet, caked in blood and mud. *Id.* She was

frightened and desperately wanted for people to go find Mike, but all she could say was, "He's on the other side." *Id.*

Meanwhile, Chambers returned to the Dallas projects. 38 RR 157. Juliet Stephanie Jones ("Stephanie"), who was thirteen years old at that time, lived with her mother. 38 RR 154-55. Stephanie knew Chambers and she remembered that he came to her mother's home with a shotgun that night. 38 RR 155-57. Chambers knocked on the door, came inside, put a shotgun –which was broken in two– in the kitchen sink to rinse the blood and hair off of it. 38 RR 158-59. Once he was done, Chambers sat down and talked with Larry Donnel Bickems ("Bickems"), and Williams. 38 RR 161. Chambers had Deia's coat, purse, and wallet. 38 RR 163-64 & 166-67. Williams had her watch. 38 RR 172. Bickems took some credit cards out of the purse, burned them in a pot, and took them outside. *Id.* Chambers wiped blood off of the money and then sat at the table dividing it up. 38 RR 169.

Stephanie agreed that Chambers was his regular, normal self. 38 RR 170. In fact, she testified that Chambers seemed to be in a good mood. 38 RR 175. Chambers and Bickems played dominoes while Stephanie braided Chambers's hair. 38 RR 174-75. And when they were finished playing dominoes, Chambers went to sleep upstairs. 38 RR 175. Bickems, who had been in the other vehicle that followed Chambers to the levee, testified that Chambers was acting normal, and nothing was out of the ordinary about him. 39 RR 37. He also testified that he heard Chambers refer to Mike saying "his head was hard" and that Chambers boasted he "started to rape her." 39 RR 16, 19, 24, 36-37 & 280.

When the police located Mike's body, his face had been driven down into the mud. 38 RR 119. "He had part of his skull broken out and was hanging aside his head, with brain matter oozing out." 38 RR 115. Mike's body was then taken to the medical examiner for an autopsy. 38 RR 55-57. The medical examiner echoed the officer's description of Mike's body, "[h]is face was encrusted with dried blood," and his "hair was a matted mass of hair, brain, blood." 38 RR 59; State's Ex. 1-B.

The autopsy revealed no less than ten wound complexes on the head. *Id.* The largest wound was a gaping tear four inches long, through which the brain was visible, where a blunt-force blow caused the bone to fragment, some of it being driven into the brain. 38 RR 61; State's Ex. 1-C. The medical examiner testified that a "[t]remendous amount of force" would be necessary to create such damage in the thickest area of the skull. *Id.* He described that "[t]he whole head was caved in and the bone was broken into little fragments, in splinters." 38 RR 61. Further examination of Mike's brain revealed "lacerations or tears in the lobes of the brain and hemorrhages throughout the control centers of the brain." 38 RR 63. Mike was alive and conscious when he received every one of the blows. 38 RR 71; 40 RR 27. The examiner also testified that the blows would have been tremendously painful, "especially the scalp." 38 RR 71.

Mike also suffered a fractured rib that was driven into his chest cavity so as to impale the lung. 38 RR 71-72. Only a severe blow could have caused such an injury in a young man. 38 RR 72-73. This injury alone could have been fatal, but the head injuries were the cause of death. 38 RR 73. Mike also had a gunshot wound on the

back of the right forearm and a potentially related gunshot wound below the navel where the same bullet passed through the soft tissue of the arm, penetrated his side, and fractured his pelvis. 38 RR 77-79.

II. The Punishment Trial

The state court summarized the State's punishment-phase evidence which consisted of testimony concerning Chambers's previous theft crime and his prison disciplinary history. *Chambers v. State,* 903 S.W.2d at 24-25.

A. Chambers's mitigation evidence

Chambers mostly presented evidence from his family of his good character. Specifically, his solid, tradional upbringing, religious tendencies, and kindness to his family. Ancillary to this testimony were brief mentions of the tough atmosphere of the west Dallas projects. It is on the basis of this almost non-existent evidence that the court below granted relief.

Cathy Hill, Chambers's former girlfriend and the mother of his child, testified that Chambers cared for and supported both her and her daughter, and consistently corresponded with her and her daughter throughout his incarceration. 42 RR 79-83, 85. Rhonda Mayes, Chambers's daughter, likewise testified that her father sent her letters and birthday cards from prison. *Id.* at 88-90.

Chambers's relatives presented modest evidence of good and nonviolent character. Rosa Chambers, his mother, remarked that Chambers reacted appropriately

to discipline, attended school and church, respected others, had a good sense of humor, and was well-liked. 42 RR 131-34. Herman Chambers, his father, testified that Chambers was respectful, that younger children liked him, that he told jokes, and that "he always had a smile." *Id.* at 194-95. He stated that Chambers sometimes worked all night on painting jobs. *Id.* at 196. Herman testified that his son did not appear to be a bully and seemed to care about people. *Id.* at 199-200. He also remarked that Chambers kept in contact with his family during his incarceration. *Id.* at 201.

Patty Chambers, his sister, testified that Chambers appeared to be a "normal kid" when he was growing up. 42 RR 120-21. She testified that he respected his family and elders, and that he had a good sense of humor and personality. *Id.* at 122. James Chambers, his uncle, similarly testified that Chambers was a normal child who respected his elders, attended school, and was polite. *Id.* at 124-26. He also stated that Chambers helped him unload groceries and tend the yard. *Id.* at 127. Ron Byrd, his cousin, testified that he was "very surpris[ed]" when Chambers, who he deemed to have a "good mind," was charged with capital murder. *Id.* at 101, 117. Glenn Byrd, another cousin, likewise testified that Chambers was respectful and pleasant. *Id.* at 213, 216. Doris Mead, yet another cousin, testified that children loved Chambers. *Id.* at 141-43.

Members of Chambers's religious community also testified on his behalf. Raymond Hunter, pastor for the Galilee Church of Christ in West Dallas, testified that Chambers respected him and refused money for assisting the church. 42 RR 148. He also remarked that Chambers avoided the use of profanity at church. *Id.* at

149. Howard Falls, a mail processor and limousine driver ordained in the Church of Christ who grew up with Chambers, stated that he never knew Chambers to intentionally harm another in all his life. *Id.* at 158. Neighbors also testified for Chambers. Wayne Sternes testified that "everybody loved [Chambers]." *Id.* at 171-72. He stated that Chambers "does not have a violent nature, other than a nature a normal kid would have." *Id.* at 174. Julius Sternes, also a former neighbor, testified that "for the kids in our community [Chambers] was a normal, peaceful guy, cordial and helpful." *Id.* at 182. He also stated that Chambers and Chambers's sister were the only individuals he knew who participated in "sitting under the light" on Saturday evenings, when they would study for the next day's Sunday school. *Id.* at 184. Finally, Chambers offered expert testimony to show he was unlikely to be a major discipline problem in prison, that he was not prone to commit acts of violence in the future, and he does not have an antisocial personality disorder. 43 RR 42-43, 56, 89, 98.

B. The jury charge

Pursuant to state law, Chambers's jury was charged with answering two special issue questions:

> Was the conduct of the defendant that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would occur?[3]

---

[3] This is the "deliberateness" special issue.

> Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?[4]

I Tr 151-52; *see* Tex. Code Crim. Proc. art. 37.071 (West 1992). The trial court also provided the jury with a supplemental instruction:

> When you deliberate about the questions posed in the Special Issues, you are to consider any mitigating circumstances supported by the evidence presented in both phases of the trial. A mitigating circumstance may be any aspect of the defendant's character and record or circumstances of the crime which you believe makes a sentence of death inappropriate in this case. If you find there are any mitigating circumstances, you must decide how much weight they deserve and give them effect when you answer the Special Issues. If you determine, in consideration of this evidence, that a life sentence, rather than a death sentence, is an appropriate response to the personal moral culpability of the defendant, you are

---

[4] This is the "future-dangerousness" special issue.

> instructed to answer at least one of the Special Issues under consideration "No."

I Tr 148.[5]

III. Direct Appeal and Postconviction Proceedings

"At his third trial[6] in 1992, [Chambers] was convicted of capital murder and sentenced to death, for the third time, for the 1975 murder of Mike McMahan during the course of a robbery." *Chambers v. Quarterman,* 191 Fed. Appx. 290, 292 (5th Cir. 2006)(footnote not in original). The Court of Criminal Appeals of Texas affirmed his conviction on direct appeal and denied habeas corpus relief. *Chambers v. State,* 903 S.W.2d 21, 34-35 (Tex. Crim. App. 1995); *Ex parte Chambers,* No. 7,929-03 (Tex. Crim. App. 1999) (unpublished order). On federal habeas review, the lower court denied Chambers's petition and the appellate court affirmed. *Chambers,* 191 Fed. Appx. at 299-302.

Shortly before his scheduled execution, this Court stayed Chambers's execution while it considered *Abdul-Kabir,* and *Brewer v. Quarterman,* 127 S. Ct. 1706 (2007). After issuing these opinions, this Court granted Chambers's certiorari petition and remanded for consideration of its latest rulings. PA II: 6-7 (*Chambers*

---

[5] This instruction is substantially similar to the "nullification instruction" at issue in *Penry v. Johnson,* 532 U.S. 782 (2001) ("*Penry II*").

[6] Chambers was originally convicted and sentenced in 1975. His conviction was overturned on a successive state writ for *Estelle v. Smith,* 451 U.S. 454 (1981), error. Chambers was re-indicted and re-tried in 1985, but his conviction was again reversed based on *Batson v. Kentucky,* 476 U.S. 79 (1986), which was decided after his trial.

v. Quarterman, 127 S. Ct. 2126 (2007)). In light of the remand, the Fifth Circuit reversed the district court's judgment, remanding with instructions to conditionally grant the writ by requiring Chambers to be resentenced and otherwise reinstated its previous opinion. PA I: 2-4. Specifically, the court below found:

> Upon reconsideration in the light of *Abdul-Kabir*, we conclude that Chambers's mitigating evidence of his exposure to violence and drugs, his lack of role models, and his lack of economic opportunity while being raised in the projects of west Dallas, had, in the view of five members of the Supreme Court, relevance to a reasoned moral judgment in imposing the death penalty, which evidence could not be given meaningful effect in answering the special issues on deliberateness and future dangerousness.

PA I: 2. Thus the court below assumed based on the remand from this Court that Chambers's evidence was unable to be properly considered under the former Texas sentencing issues even though it characterized such evidence as " very scant." PA I: 2, n. 1. The lower court then denied the State's petition for rehearing. PA III: 9-10 (*Chambers v. Quarterman*, No. 03-11248 (5th Cir. Jan. 28, 2008) (unpublished order denying rehearing en banc)).

REASONS FOR GRANTING THE WRIT

Chambers has spent over thirty years on death row. And he has received more than his share of due process having had his conviction reversed twice for legal technicalities that did not implicate his guilt. Thus, granting relief because there is a possibility a jury was unable to fully consider his scant evidence of poverty results in another windfall for a man thrice sentenced to death for callously shooting two people until his gun jammed and, upon discovering they were still alive, brutally beating them until he crushed the man's skull, also leaving the woman for dead.

Shortly before Chambers's long-awaited execution date, this Court granted certiorari in *Abdul-Kabir* and *Brewer,* holding this case in abeyance and, yet again revisiting the issue of when *Penry* error occurs. *Penry* error occurs when the jury is unable to give meaningful effect to certain types of mitigating evidence; thus, the death sentence would not necessarily reflect the jury's "reasoned moral response." But underlying this "moral response" is nothing more than the jury's determination that, at the end of the day, the mitigating evidence did not outweigh the aggravating evidence. Yet no reasonable jury would find Chambers's weak evidence of poverty so sympathy-provoking as to overcome the horrific murder and attempted murder he committed. And requiring an expensive and difficult –if not impossible– retrial more than three decades later is fundamentally at odds with the traditional role of habeas corpus review. This Court should review this case because no other case presents the legal issues as cleanly and starkly as this one. There is no more perfect vehicle

to showcase the inequities inherent in knee-jerk reversals without consideration of harm.

In the instant case, the lower court read this Court's remand as instructions to reverse. Bound by the strictures of the en banc decision in *Nelson,* —and in clear contravention of this Court's precedents— it refused to consider harm, deciding there was error without any consideration of the persuasiveness, relevance or even amount of Chambers's evidence. But as the record fairly shows, in this case, any constitutional error did not have a "substantial and injurious effect or influence" on the verdict.

Further, the appellate court's ruling is extreme in that it holds that mere poverty is so sympathy-provoking as to render a defendant less morally culpable in the same way as mental illness, retardation, and severe child abuse. Read broadly this opinion can support the proposition that any categorical disadvantage entitles a defendant to relief if he was sentenced under the former Texas special issues. Yet the court below has found it impossible to maintain this position. *See, e.g., Smith v. Quarterman,* 515 F.3d 392, 414 (5th Cir. 2008). This remarkable inconsistency only highlights the injustice of this case. It is the fundamental unfairness of granting Chambers relief for the third time –which practically insures that the State will never be able to carry out its mandate– that begs for this Court's review.

I. The Lower Court Erred in Finding *Penry* Error Because this Court's Rulings in *Abdul-Kabir* and *Brewer* Did Not Fundamentally Alter its Prior Jurisprudence. And There Was No Argument from the Prosecutor That Confined the Jury's Consideration of the Evidence.

In *Abdul-Kabir* and *Brewer,* this Court held that *Penry* error occurs when there is a reasonable likelihood a jury is not permitted to give "meaningful effect" or a "reasoned moral response" to a defendant's mitigating evidence. *Brewer,* 127 S. Ct. At 1710, 1712; *Abdul-Kabir,* 127 S. Ct. at 1675. The Court made it clear that this "firmly established" principle had remained unchanged since 1976. *Abdul-Kabir,* 127 S. Ct. at 1664. But the Court also explained that "[t]he former [Texas] special issues provided an adequate vehicle for the evaluation of mitigating evidence offered to disprove deliberateness or future dangerousness." *Id.* at 1670. Similarly, the special issues are satisfactory "when mitigating evidence has only a tenuous connection — 'some arguable relevance' — to the defendant's moral culpability." *Id.* at 1668 n.14.

The Court further explained that, in *Abdul-Kabir,* the "evidence of childhood deprivation and lack of self-control did not rebut either deliberateness or future dangerousness but was intended to provide the jury with an entirely different reason for not imposing a death sentence," *i.e.,* "his violent propensities were caused by factors beyond his control — namely, neurological damage and childhood neglect and abandonment." *Id.* at 1661, 1672. Similarly, "Brewer's mitigating evidence served as a 'two-edged sword' because it tended to confirm the State's evidence of future dangerousness as

well as lessen his culpability for the crime." *Brewer,* 127 S. Ct. at 1712. Further, the special issues also failed in *Abdul-Kabir* because they were "undermined" by prosecutorial argument "that the law compels [the jury] to disregard the force of evidence offered in mitigation." 127 S. Ct. at 1673. The *Brewer* opinion reached the same conclusion. Thus, it was this overly aggressive prosecutorial argument that distinguished *Abdul-Kabir* and *Brewer* from *Johnson v. Texas,* 509 U.S. 350 (1993), and *Graham v. Collins*, 506 U.S. 461 (1993). *Id.*

Evidence such as good and non-violent character despite an impoverished or disadvantaged upbringing — offered to prove that Chambers's "brief spasm of criminal activity" was "an aberration that was not likely to be repeated" — "is *primarily, if not exclusively,* relevant to the issue of future dangerousness," and "could easily have directed jurors towards a 'no' answer with regard to [that] question." *Id.* at 1667, 1673 & n.23 (quoting *Graham,* 506 U.S. at 475-76) (emphasis added). Chambers's evidence is precisely this kind. And if this is not the case in which "the special issues provided for adequate consideration of the defendant's mitigating evidence," then this Court would not have noted the "reassuring" fact that not every case "would require a new sentencing" hearing in *Abdul-Kabir.* 127 S. Ct. at 1671 & n.20. Instead, every case would be subject to reversal no matter what evidence was adduced at trial.

Chambers's entire mitigation case is summarized above. Overwhelmingly, he presented traditional good character evidence which this Court has stated is able to be fully considered under the special issues. *Graham,* 506 U.S. at 466. Thus, it is only the occasional asides of Chambers's childhood in the West Dallas Projects on

which the court below granted relief. But all of Chambers's evidence was offered by defense counsel to prove that Chambers would not be a future danger. *See, e.g.*, 47 RR 23 ("It's sometimes hard to find people after 17 years who will come in here and tell you how he was liked, how he was loved, how he laughed, how the little children loved him, how he went to school, how he had friends"). Counsel highlighted the fact that Chambers had not committed any criminal acts of violence in his seventeen years on death row, his advanced age made that possibility increasingly remote, and his mental status was perfectly normal. *Id.* at 26-37, 39-40, 53–54. In fact, counsel spent nearly all of his time discussing Chambers's self-control and lack of future dangerousness.

Counsel's only mention of Chambers's disadvantaged background was for the purpose of explaining why he did not outwardly show remorse when he was indeed remorseful within.[7] *See, e.g., id.* at 38-39 ("He grew up in an area where you didn't cry"). Counsel's only reference to Chambers's daughter was an

---

[7] In his lower-court brief, Chambers noted two other points during closing argument at which the defense "emphasized — separately and without reference to the dangerousness special issue — Mr. Chambers'[s] ... difficult environment growing up in the projects." Chambers Brief at 29 n.5 (quoting 47 RR 22, 46). The first is counsel's statement that both the victim and Chambers "were both boys," both "grew up in a fine family," and with "a lot of friends," despite the fact they grew up in a "different environment." 47 RR at 22. This can hardly be read as a description of Chambers's disadvantaged upbringing. Indeed, "different" and "difficult" do *not* have the same meaning in this context or any context. Similarly, counsel's reference to "living in the projects" contains no suggestion that Chambers was less culpable as a result. *Id.* at 46. Chambers's embellishment of the record aside, it is clear that the entire defense case rested on the premise that Chambers's was nonviolent and would not be a future danger.

acknowledgment that he too had "normal human feelings," which occurred within a long discussion concerning the credibility of Chambers's mental-status evidence. *Id.* at 39-46. Counsel's sole references to Chambers's relationship with his daughter and his impoverished upbringing amounts to approximately *nine lines* within nearly *nine-hundred* lines of argument.

This Court reasoned that the special issues in *Abdul-Kabir* and *Brewer* failed because they were "undermined" by prosecutorial argument "that the law compels [the jury] to disregard the force of evidence offered in mitigation," or to "disregard[] any independent concern that, given [the defendant]'s troubled background, he may not be deserving of a death sentence." *Abdul-Kabir,* 127 S. Ct. at 1673; *Brewer,* 127 S. Ct. at 1712. It was this dilemma that distinguished *Abdul-Kabir* and *Brewer* from *Johnson* and *Graham. Abdul-Kabir,* 127 S. Ct. at 1673 & n.23. But no such argument was made in this case. Thus, a juror considering Chambers's evidence would *not* feel compelled to provide a "yes" answer to the future-dangerousness question. Instead, that juror would find ample means for giving *meaningful* effect to Chambers's evidence by "accept[ing] the suggestion ... that his brief spasm of criminal activity ... was properly viewed ... as an aberration that was not likely to be repeated." *Abdul-Kabir,* 127 S. Ct. at 1673 & n.23 (emphasis in original).

In the court below, Chambers conceded that "the prosecution was mostly silent regarding [his] evidence of his difficult background and his ongoing caring relationships with his daughter and family." Chambers's Brief at 29 n.5. He never identified a single instance

where the prosecutors told the jury to ignore the mitigating evidence.

In light of the absence of traditional *Penry* evidence, and the lack of prosecutorial argument limiting the jury's consideration of mitigating evidence, it is clear that the lower court's decision is at odds with this Court's precedent. Certiorari review is necessary to correct this injustice.

II. The Precedent of this Court Makes Clear That *Penry* Error Is Not Structural Error, Thus the Inquiry Does Not End upon the Determination That There Was a Reasonable Likelihood That the Jury Was Precluded from Considering and Giving Effect to the Defendant's Mitigating Evidence.

A. With only the exception of defective reasonable-doubt instructions, this Court has unequivocally held jury-charge error to be trial error.

It has long been settled that "trial error" is that which has "occurred during the presentation of the case to the jury, and . . . may therefore be qualitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless." *Arizona v. Fulminante*, 499 U.S. 279, 207-08 (1991). The *Fulminante* Court recognized that "most constitutional errors can be harmless." *Id.* at 306. *See also United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2564 (2006). And as the Court explained in *Neder v. United States*, "'[i]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that

any other constitutional errors that may have occurred are subject to harmless-error analysis.'" 527 U.S. 1, 8 (1999) (quoting *Rose v. Clark*, 478 U.S. 570, 579 (1986)), *see also id.* at 9.

Structural defects, on the other hand, are different and exceedingly rare. With such errors, "[t]he entire conduct of the trial from beginning to end is . . . affected." *Fulminante*, 499 U.S. at 309-10. In this way, then, structural defects "'defy analysis by "harmless-error" standards' because they "affec[t] the framework within which the trial proceeds," and are not 'simply an error in the trial process itself.'" *Gonzalez-Lopez*, 126 S. Ct. at 2564 (quoting *Fulminante*, 499 U.S. at 309-10) (alterations in original). Indeed, the Court has only found structural error in six discrete instances. *See Tumey v. Ohio*, 273 U.S. 510 (1927) (biased trial judge); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (denial of counsel); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (racial discrimination in grand-jury selection); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U.S. 39 (1984) (denial of public trial); *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (defective reasonable-doubt instruction). As the Court concluded in *Rose*:

> Placed in context, the erroneous . . . instruction does not compare with the kinds of errors that automatically require reversal of an otherwise valid conviction . . . [because] the error in this case did not affect the composition of the record. Evaluation of whether the error prejudiced [the defendant] thus does not require any difficult inquiries concerning matters that

> might have been, but were not, placed in evidence. Consequently, there is no inherent difficulty in evaluating whether the error prejudiced respondent in this case.

478 U.S. at 579-80 & n.7 (citations omitted).

Consistent with these principles, most jury-charge errors have been held to be trial errors subject to harmless-error analysis. *See Washington v. Recuencco*, 126 S. Ct. 2546 (2006) (failure to submit sentencing factor to jury); *Mitchell v. Esparaza*, 540 U.S. 12 (2003) (per curiam) (instruction omitted element of offense); *Neder* (instruction omitted element of offense); *Calderon v. Coleman*, 525 U.S. 141 (1998) (misleading jury instruction); *Clemmons v. Mississippi*, 494 U.S. 738 (1990) (state court invalidated aggravating factor as a matter of state law after the verdict); *Carella v. California*, 491 U.S. 263, 266 (1989) (erroneous conclusive presumption in jury instruction); *Pope v. Illinois*, 481 U.S. 497, 501-04 (1987) (jury instruction contained wrong constitutional standard); *Rose* (instruction improperly shifted burden of proof on element of crime). *But see Sullivan* (improper definition of "beyond a reasonable doubt" nullifies verdict and results in structural error).

Chambers's jury was charged according to state law at the time of his trial: the special issues asked the jury to consider his future dangerousness and the deliberateness of his actions. Additionally, Chambers's jury, having been empaneled shortly after *Penry I* was decided, was given the supplemental instruction later found to be an inadequate remedy in *Penry II*. This is

classic jury-charge error. *See Smith II*, 127 S. Ct. at 1699 (Alito, J., dissenting) ("The federal constitutional error that occurred in the penalty phase of petitioner's trial and that was identified in *Smith v. Texas*, 543 U.S. 37 [] (2004) (per curiam) [], concerned a flaw in the jury instructions[.]"). As such, it is properly classified as trial error.

B. That *Penry* error arises in the context of death penalty case does not transform such garden-variety trial error into structural error.

This Court's Eighth Amendment jurisprudence demands that a capital sentencing jury not be precluded from considering, as a mitigating factor, the character and record of the individual offender, as well as the circumstances of the particular offense. This ensures that the jurors will be able to give their "reasoned moral response" to the defendant's mitigating evidence. *E.g.*, *Penry II*, 532 U.S. 782; *Penry I*, 492 U.S. 302; *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality op.). In Texas, when the jury is so precluded, this gives rise to *Penry* error. But the Court has not hesitated to find these types of jury-instruction problems amenable to harmless-error analysis. The lower court, on the other hand, has carved a new exception out of whole cloth: "moral judgements" are not subject to harmless-error review. *Nelson*, 472 F.3d at 314-15 & n.8.

In a major departure from this Court's general rule that jury-charge error is trial error, even where the death penalty has been imposed, the court below suggests that *Penry* error should be structural error. *Id.*

Nelson relied principally on the absence of any harm analysis — and the lack of any suggestion that harm analysis might be appropriate — from the *Penry* line of cases. *Id.* at 314 (citing *Tennard v. Dretke*, 542 U.S. 274 (2004); *Penry II*, 532 U.S. 782; *Penry I*, 492 U.S. 302). This absence, the court explained rests on

> the recognition that *Penry* error deprives the jury of a "vehicle for expressing its 'reasoned *moral* response' to the defendant's background, character and crime,'" which precludes it from making "'a reliable determination that death is the appropriate sentence.'" *Penry II*, 532 U.S. at 797 [] (quoting *Penry I*, 492 U.S. at 328 []) (internal quotation marks omitted) (emphasis added). This reasoned *moral* judgment that a jury must make in determining whether death is the appropriate sentence differs from those fact-bound judgments made in response to the special issues.

Id. at 314-15 (emphasis in original).

As an initial matter, the absence of something does not make the opposite true. That aside, in deciding as it did, the lower court wholly ignored that the "reasoned moral response" is nothing more than a factual determination that, in the minds of the jurors, the defendant's mitigating evidence did not overcome whatever aggravating factors were at play, including but not limited to, the facts of the crime and the defendant's prior criminal history. Especially instructive is this

Court's determination that *Hitchcock*[8] error can be harmless. *See Singletary v. Smith*, 507 U.S. 1048 (1993) (granting certiorari and remanding to appellate court in light of recent opinion in *Brecht v. Abrahamson*, 507 U.S. 619 (1993)).

At issue in *Hitchcock* was a Florida statute limiting the mitigating circumstances a jury or judge could consider to only those enumerated. 481 U.S. at 395-96. While defense counsel argued to the jury that "it was to 'look to the over picture . . . consider everything together . . . consider the whole picture, the whole ball of wax," the prosecutor insisted that the jury was to "consider the mitigating circumstances and consider those by number.'" *Id.* at 398 (internal citations omitted). Further, the trial judge instructed the jurors that they were to consider only those aggravating and mitigating circumstances as allowed for by state law. *Id.* This violated the Eighth Amendment:

> We think it could not be clearer that the advisory jury was not instructed to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of *Skipper v. South Carolina*, 476 U.S. 1 [] (1986), *Eddings v. Oklahoma*, 455 U.S. 104 [], and *Lockett v. Ohio*, 438 U.S. 586 [].

Id. at 398-99. No meaningful difference exists between the law invalidated in *Hitchcock* and the Texas special

---

[8] *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

issues found to be inadequate in *Penry I*, *Abdul-Kabir*, and *Brewer*.

C. The conclusion that the jury instructions created a reasonable likelihood of misapplication does not end the inquiry.

When a claim involves jury instructions in capital-sentencing proceedings, the relevant inquiry is whether there is a reasonable likelihood the jury applied them in such a way that precluded consideration of the defendant's mitigating evidence. *Boyde*, 494 U.S. at 380; *see also Abdul-Kabir*, 127 S. Ct. at 1673-674; *Smith II*, 127 S. Ct. at 1698; *Estelle v. McGuire*, 502 U.S. 62, 72 & n. 4 (1991); *Nelson*, 472 F.3d at 311. But as *Calderon* explained, even where a *Boyde* analysis has been made, a federal habeas court must go one step further:

> Although the *Boyde* test for constitutional error, like the *Brecht* harmless-error test, furthers the "strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation," 494 U.S. at 380 [], it is not a substitute for the *Brecht* harmless-error test. The *Boyde* analysis does not inquire into the actual effect of the trial error on the jury's verdict; it merely asks whether constitutional error has occurred.

525 U.S. 146-47.

This Court has been very clear when concluding constitutional error required automatic reversal. *See, e.g.*, *Gonzalez-Lopez*, 126 S. Ct. at 2564 ("[E]rroneous

deprivation of the right to counsel of choice, . . . qualifies as 'structural error.'"); *Sullivan*, 508 U.S. at 281-82 (denial of trial by jury due to a defective reasonable doubt instruction "unquestionably qualifies as structural error"); *Vasquez*, 474 U.S. 263-64 ("[D]iscrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review."). But with respect to *Penry* error, no such suggestion, much less a plain statement, has ever been made despite numerous opportunities to do so. For good reason: because *Penry* error, like all other trial errors, should not require automatic reversal and is thus subject to harmless-error analysis.

III. Even If There Is *Penry* Error in this Case, the Record Does Not Support a Finding That the Error Had a "Substantial and Injurious Effect or Influence" on the Verdict.

Brecht mandates that the standard of review for harm should be "whether the error 'had a substantial and injurious effect or influence in determining the jury's verdict.'" 507 U.S. at 637 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). *See also Fry v. Pliler*, 127 S. Ct. 2321 (2007). This means that "a harmlessness finding requires 'fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error.'" *Id.* at 2330. (Stevens, J., concurring in part and dissenting in part) (quoting *Kotteakos*, 328 U.S. at 765). The policies underlying *Brecht*'s harmless-error standard are "the State's interest in the finality of convictions," comity, and federalism during collateral review. 507 U.S. at 635. Granting relief without any evidence of actual harm

violates the role of habeas corpus review: traditionally a vehicle to grant relief to those whom society has 'grievously wronged.'" *Id.* at 637. Yet, Chambers has not been "grievously wronged."

The lower court's grant of relief to Chambers is based on negligible evidence. Any depiction of Chambers's "ghetto childhood" and exposure to drugs, violence and crime is on the basis of a handful of words, uttered in passing, by a few witnesses, for example: defense punishment-phase witness Ron Byrd's mention of "a lot of bad influence." 42 RR 94-95, 105. At trial, counsel's only mention of Chambers's disadvantaged background during closing argument was to explain why he did not outwardly show remorse when he was indeed remorseful within. *See, e.g.,* 47 RR 38-39 ("He grew up in an area where you didn't cry"). It is on the basis of this scant and unpersuasive evidence that the panel has determined Chambers is entitled to relief. PA I: 2-4.

Further the decision to grant relief in a thirty-three year-old case has significant costs. It remains to be seen whether the State can effectively retry Chambers's punishment case yet again. And if the State cannot salvage Chambers's death sentence, although his conviction will remain intact, he will become immediately parole eligible. Tex. Code Crim. Proc. Ann. Art. 42.12 § 15(a) (Vernon 1973). Certainly, the societal costs of this case, particularly in the administration of justice, weigh heavily in favor of considering harm. Notably, a cost-benefit analysis is part of any analysis under *Teague v. Lane*, 488 U.S. 289 (1989). And this Court has found that the costs of retroactive application generally, and almost certainly will outweigh the benefits. *See Sawyer v. Smith*, 497 U.S. 227, 242-43

(1990); *see also McKlesky v. Zant*, 499 U.S. 467, 490 (1991) (observing that when a habeas petitioner is granted a new trial, the "erosion of memory and dispersion of witnesses that occur with the passage of time prejudice the government and diminish the chances of a reliable criminal adjudication." (citation omitted)). In this context, habeas review "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Duckworth v. Egan*, 492 U.S. 195, 210 (1989) (O'Connor, J., concurring). Therefore, the interests of justice — finality, comity, and federalism — strongly favor consideration of whether any *Penry* error had a "substantial and injurious effect or influence" on the verdict."[9] *Id.*

In the instant case, there is no doubt the instructions given to the jury were problematic under both *Penry I* and *Penry II*. But the state courts did not recognize the constitutional error, much less apply any sort of harm analysis. The *Fry* Court explained it is nevertheless the duty of the federal habeas court to conduct a harm analysis. 127 S. Ct. at 2328. Even so, the lower court did not conduct a harm analysis because whether such is applicable where there is *Penry* error has not been decided by this Court. It is nevertheless appropriate for this Court to consider whether the *Penry* error in this case was harmless. *See Yates v. Evatts*, 500

---

[9] Importantly, the *Nelson* court did not even pay lip service to the concerns and principles on which the harmless-error analysis relies. 472 F.3d at 314-15; *see also id.* at 331-37 (Dennis, J., concurring and assigning additional reasons).

U.S. 391, 407 (1991) ("[W]e have the authority to make our own assessment of the harmlessness of a constitutional error in the first instance.") (citation omitted); *Rose*, 478 U.S. at 407 ("[W]e 'plainly have the authority' to decide whether, on the facts of a particular case, a constitutional error is harmless under the *Chapman* [*v. California*, 386 U.S. 18 (1967)] standard.") (citing *United States v. Hastings*, 461 U.S. 499, 510 (1983)).

In considering whether *Penry* error occurred under the former Texas sentencing issues, this Court has placed special emphasis on the fact that Texas juries are aware of the consequences of their actions and are thus "likely to weigh mitigating evidence as it formulates these answers in a manner similar to the one employed by capital juries in 'pure balancing states.'" *Johnson*, 509 U.S. at 370-71 (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 182 n.12 (1988) (plurality op.)). Chambers's jury was likewise aware, as it was instructed that an affirmative answer to both special issues would result in the imposition of the death penalty and a negative answer to one would result in a life sentence.

The responsibility assigned to jurors in a capital murder trial is serious. We cannot assume they do not take it seriously. The *Lockett* Court presumed that "'jurors . . . confronted with the awesome responsibility of decreeing death for a fellow human [would] act with due regard for the consequences of their decision.'" 438 U.S. at 598 (quoting *McGautha v. California*, 402 U.S. 183, 208 (1971)). Nothing in the record suggests the jury in this case acted in a contrary manner. And ultimately, even taking into account the flawed special issue questions and the inadequate supplemental instruction,

nothing in the record suggests that the death sentence imposed reflects something less than the jury's "reasoned moral response." The Eighth Amendment was thus not offended.

CONCLUSION

For the foregoing reasons, this Court should grant the Director's petition for writ of certiorari.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

ERIC J. R. NICHOLS
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Postconviction
Litigation Division

*ELLEN STEWART-KLEIN
CARRIE ELIZABETH PARSONS
Assistant Attorneys General
Postconviction Litigation
Division

* Counsel of Record

P.O. Box 12548
Capitol Station
Austin, Texas 78711-2548
Tel: (512) 936-1400
Fax: (512) 320-8132
Email:
Ellen.Stewart-
Klein@oag.state.tx.us

ATTORNEYS FOR
PETITIONER